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IN THE

Supreme Court of the United States

No. 79-500

DAVANNE REALTY COMPANY, VINMAN COMPANY, NEWARK JERSEY COMPANY, CLAYTON HOLDING COMPANY, MONNA, INC., all of the foregoing being corporations of the State of New Jersey; PHILIP MANDELBAUM and ELLA MANDELBAUM, his wife; and ROBERT GOLDBERG and DIANE GOLDBERG, his wife,

Petitioners,

vs.

MAYOR and TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MONTVILLE,

Respondent,

and

COMMITTEE FOR THE PRESERVATION OF NORTHERN MONTVILLE, INC.,

Respondent-Intervenor.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondent-Intervenor

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TO: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States

Defendant-Respondent, Township of Montville, hereby respectfully opposes Petitioners' Petition for a Writ of Certiorari to review the Judgment of the Supreme Court of New Jersey and the Judgment of the Appellate Division of the Superior Court of New Jersey.

OPINIONS BELOW

Petitioners' statement concerning Opinions Below is adequate.

JURISDICTION

Defendant-Respondent respectfully denies that any grounds for granting the Writ has been demonstrated.

QUESTIONS PRESENTED

1. Whether any grounds for the granting of a Writ of Certiorari have been demonstrated where a state tribunal correctly upheld the validity of a zoning amendment based upon an application of clearly established zoning law to the particular facts involved and where no substantial federal question has been presented.

2. Whether any issues of the taking of property are raised where the record reveals that petitioners failed to demonstrate that the zoning restrictions rendered their lands useless and in fact conceded that their lands could be developed under the zoning amendment.

3. Whether any basis for further review has been presented in view of long-established federal and state standards of judicial review which provide that, where, as here, the record demonstrates a reasonable basis for the zoning it must be sustained by the courts.

STATEMENT IN OPPOSITION TO CERTIFICATION

The Rules of the United States Supreme Court, *Rule* 19, establish the grounds for the granting of certiorari in cases involving decisions of state courts:

> "1. Review on a Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefore . . ."
>
> a) Where a state court has decided a Federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court."

Despite petitioners' efforts to portray this case as one of great constitutional moment, the facts of the case and the record below clearly do not satisfy any of the criteria for the granting of certiorari as set forth in the *Rule*.

As is evident from the facts and the record, this case, brought in a state court by a developer whose sole interest was economic self-interest in a high density use for his own particular tract of land, involves application of established zoning law to a particular set of facts—the reasonableness of zoning for a particular portion of a municipality that was based upon the justifications described herein.

Here, petitioners have presented nothing more than the familiar constitutional claims that resolve themselves into a normal zoning case and application of well-established zoning principles to the factual situation at hand, facts that have been reviewed at every level of the New Jersey courts. No special and important reasons have been

presented, nor has any federal question been presented, since the zoning principles applied by the New Jersey courts were those relating to the state's police power to zone, as established some fifty years ago in the *Euclid* decision.

No grounds for granting a Writ of Certiorari have been presented where the courts of New Jersey, one of the leading jurisdictions in zoning law, reasonably concluded on the record that the health, safety or general welfare would be promoted by particular zoning regulations enacted pursuant to a delegation of zoning power by state statute, and where the petitioners by their own case admitted that their lands could be developed under the zoning in question.

Defendant-Respondent, Township of Montville, hereby respectfully opposes the Petition for a Writ of Certiorari in the within captioned matter.

COUNTER-STATEMENT OF THE MATTER INVOLVED

Petitioners' Statement of Facts is in reality nothing more than another misleading, argumentative and distorted rehash of the facts, which wrongly assumes that yet another trial on the facts should take place before the United States Supreme Court. The New Jersey courts have made findings of fact based upon the evidence in determining the reasonableness of the zoning, and another trial of those facts is clearly not the purpose of a petition for certiorari.

On July 18, 1974, the Township Committee of the Township of Montville, New Jersey, enacted an amendment to the Montville Zoning Ordinance, rezoning approximately 2,400 acres of land in the area north of the Erie

Lackawanna Railroad in the northern section of Montville Township.

Plaintiffs filed a complaint on September 19, 1974 attacking the zoning amendment, which complaint also included a Count III seeking to declare the entire zoning ordinance of the municipality invalid by reason of its alleged failure to provide for multi-family housing.

At the pretrial conference in the matter, at the request of the Township, the court bifurcated the issues in the case, and determined that the case would proceed first on the issues of the validity of the zoning amendment of 1974. It further determined that the attack on the entire zoning ordinance, which came to be designated as Phase II or the *Mt. Laurel* phase (from *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 913 (1975)) would be severed from the attack on the amendment of 1974, and that this phase of the case would follow Phase I if necessary.

The matter proceeded to trial on the issues of the July, 1974 amendment in the latter part of September, 1975 with the lengthy trial continuing for some weeks and not concluding until on or about November 13, 1975.

The court concluded by sustaining the three acre zoning as to the 2,400 acres. (Opinion, January 9, 1976, T17, 17-19).

The court then also sustained the 3-acre density as to plaintiffs' lands as well, except as to the cluster provisions, which the court found to be unreasonable for the reasons set forth in the opinion (T20, 10-25). The court concluded by finding that the entire amendment would be sustained, provided that a more reasonable cluster alternative is enacted (T20, 10-22). The Township amended the cluster provisions in May, 1976. No chal-

lenge was ever brought by plaintiffs to the revised cluster provisions.

On April 14, 1976 the court heard argument on Phase II of the matter. By order dated May 10, 1976 the court found that the Township was a developing municipality under the *Mt. Laurel* case and ordered the municipality to complete its master plan study then underway and enact implementing ordinances to comply with the *Mt. Laurel* decision by January 21, 1977. The order was specifically limited to a finding that the Township was a developing municipality, with the decision as to the consequences of that finding and how best to provide for a variety of housing being intentionally left to the judgment of the local legislative body.

Plaintiffs then appealed to the New Jersey Superior Court, Appellate Division, which affirmed the decision of the trial court, emphasizing that it "would not fault the legislative judgment of the Township's governing body which determines that the northern section of the Township cannot sustain high density use at this time" (Pg. 2).

Petitioner's subsequent petition for certification to the New Jersey Supreme Court was denied.

The Township enacted a comprehensive new zoning ordinance in March, 1977. The revised ordinance contains the revised cluster provisions previously enacted in May, 1976 in response to the trial court's ruling on Phase I, and maintains the three acre lot size in Northern Montville upheld by the trial court in Phase I. In response to the *Mt. Laurel* decision and the results of Phase II in this case, the new zoning ordinance also contains provision for other housing types and densities elsewhere in the municipality, and now includes provisions for multi-family housing, including two-family housing, senior citizens housing, townhouses and a P.U.R.D. Zone, with a mix of townhouses, apartments and two-family housing.

The new zoning ordinance also has never been challenged by petitioners.

This area had been zoned for one acre and two acre lots (October 16, T94, 3-14) the effect of the amendment of July, 1974 having been to rezone to an A-1 classification, and increase the pre-existing A-2 zone in Northern Montville of 45,000 sq. ft. to 120,000 sq. ft., and the lot size in the A-1 zone from 80,000 sq. ft. to 120,000 sq. ft. and combining the two so that the A-1 zone extended across the northerly portions of the Township (October 16, T101, 1-7).

There was substantially no dispute, and the trial court so found, that the re-zoned area is and the plaintiffs' lands are generally characterized by hilly topography and steep slopes, erodable soil and wetlands; is underlain by precambrian gneiss bedrock; that the soil conditions and rock outcroppings pose limitations on development; and that severe septic disposal limitations are present. Plaintiffs' lands contained areas with the same conditions and counsel for plaintiffs conceded in his opening statement that if this area is to be developed with septic tanks many of the Township's concerns are valid (September 30, T29, 1-15).

There was also no dispute that development has occurred very slowly in northern Montville, there being only 47 homes in the area, this condition occurring in the opinion of the trial court because of the natural limitations of the area. It was also not disputed that there are no public water and sanitary sewer facilities in this area of the Township, that there are no such facilities presently contemplated nor that plaintiffs do not have a contract or even

negotiations pending with the Township for such services; nor that they do not have an approved sewage treatment facility.

It was also undisputed that the Township Committee's enactment of the amendment to provide for a lower density for the area was based upon the foregoing considerations, including presentations from the defendant-intervenor CPNM, as well as that favorable reports from the Township Planning Board and Planning Consultant had been received, the Planning Consultant having broadened the initial re-zoning request to include the entire area re-zoned because of similar topography conditions and soil characteristics, and having proposed the cluster option.

The Township's determination of the need for low density zoning in this particular area of the Township was based upon a combination of zoning considerations. These factors were a) that the area is hilly and characterized by steep slopes throughout; b) that soils throughout present severe limitations for community development because of limitations on septic effluent disposal and considerable erosion potential; c) the absence of public water and sanitary sewer facilities in northern Montville; d) that the area is remote from conveniences and municipal facilities and services.

The petitioners' case at trial was largely devoted to a specific development proposal to construct a high density development on its lands. The testimony and accompanying exhibits for this proposal were objected to in their totality, and were subsequently admitted very limited purposes by the trial court (Opinion Page 5a).

Even examining the merits of the proposal it was clear that the proposal was totally lacking and nothing more than a speculative development scheme which was fraught

with problems and difficulties. Petitioners first produced an engineer to testify on this development proposal. This witness conceded on cross examination (October 1, T210, 4-19) that the site is not presently served by water, and it was further stipulated by defense counsel that the developers had no contract with the local utility for such water supply. On the question of sanitary sewer disposal, the area in question is not presently served by sewers, and this same witness conceded that the municipal sewer system is "far off from being located in close proximity to the area in question" (October 1, T146, 6-9). His presentation on his sewage disposal system the trial court found lacking (Opinion, p. 8), and he also conceded that the developer did not have an approved treatment facility from the State.

The testimony of Mr. Aurnhammer, another of plaintiffs' engineers, was also based entirely upon the assumption of facts which did not exist and without independent investigation, that is the availability of water and an approved sewage treatment plant (October 2, T44, 11-17). Again, this testimony was based on the same proposed development scheme, and was based upon only two possible subdivision layouts, notwithstanding "that the variety of layouts is virtually infinite" (October 2, T80, 13-18), this in an effort to show that the zoning created excessive construction costs. In fact, no other possible layouts were actually laid out (October 2, T79, 8-13).

This witness also described the terrain as being characterized by severe topography and thus there was general agreement with this fundamental point concerning the natural limitations of the property.

Finally, the reading of this witnesses' testimony clearly revealed that the layouts he utilized were *not* the least expensive way to develop the land (October 2, T29-

T30). In fact, he conceded on cross-examination that in making his layouts it was his "project to arrive at the maximum economic return for the developer" (October 2, T83, 14-17).

The most that this testimony showed was that the plaintiffs' development costs might (using his two particular layouts which he did not claim were the cheapest), be higher and therefore profit return lower, for the zoned development than that for plaintiffs' proposed development. This is far short of a showing that the zoning has deprived the plaintiffs of any use of its property, which was the petitioners' legal burden.

Plaintiffs' planning expert, Peter Abeles, made the same assumptions as to the availability of water and sewer. While the thrust of this witnesses' testimony was that development should be concentrated in this area, he never addressed himself to the ultimate question of the impact of his recommended density of two to three families per acre on the municipality, or the impact of the development proposal which alone would have yielded a 19% increase in the Township's population. He also made a major concession on cross-examination with reference to the subject of utilities that the trial court noted in its opinion. As the court noted, his initial testimony was that water availability and sewer availability are not an acceptable basis for zoning and should not be considered except in an ancillary manner. On cross-examination, as the trial court pointed out, he sharply modified his testimony so as to state that whether the area can be supplied with proper public utilities should have a bearing on the zoning.

Mr. Abeles further conceded that it would not make good planning sense to put 14,000 people in the A-1 Zone in northern Montville (October 6, T122, 22-25 to T123, 1-3), and then conceded that there are substantial parts of the Township lying south of the railroad that are not yet fully developed, and that a great deal of such land does not present the difficulties of terrain and soil that are present in the A-1 Zone, and that this same area is served to a degree by water and sewer facilities (October 7, T130, 4-8).

Finally, he admitted that generally it is reasonable as a matter of municipal policy to develop areas which are served or convenient to be served by sewer and water before extending water and sewer lines into new outlying areas (October 7, T130, 9-24). Thus Mr. Abeles was in accord with the Township planning consultant on this critical point.

The following witness was Mr. John Lasser, whose testimony is described in Point II herein.

Mr. O'Grady, the Township's planning consultant, testified as to the justification for the rezoning. He explained that little development had occurred in this rezoned area prior to the amendment, and using appropriate maps and documents indicated a pattern of development in the central and southern portions of the Township, the area most accessible and most served by water and sewer utilities. He also testified that the initial zoning request that came to him concerned a restricted area around Lake Valhalla and that because of similar geographic and other factors he had broadened the request and his study to include the entire area which was eventually rezoned, and that he then recommended and drew a suggested amendment and added the 1 acre cluster option (October 16, 1975, T102, 10-21). He proceeded to explain his reasons and opinions in support of the amendment which at the time of the rezoning were expressed in letter reports to the Township.

These reasons were generally set forth in four basic areas of consideration. On the first consideration of steep slopes and topography, the witness testified based on geologic and soils information supplied by the United States Department of Agriculture, Soil Conservation Service and the United States Geological Survey which was available to him at the time he studied the rezoning. His testimony, based on appropriate maps, indicated that severe slopes of 15% or more cover a very large area of the rezoned area, with many of these areas with slopes of 25% or greater (T105-T106). He then testified that as a result of the severe slopes, that a relatively low density is preferred and more desirable because of the difficulties in development and the high erosion potential (T106, 11-18). He testified that the cluster provision which he had recommended was intended to allow the development to be confined to the lands with moderate topography, with the areas of steep slope left undisturbed (T106, 19-25 to T107, 1-3).

The next consideration was that of soils, which again was based on the data referred to above, the witness giving consideration to such factors as depth to bedrock, erosion potential and drainage characteristics, particularly as these related to limitations on septic effluent disposal, erosion and drainage. The witness concluded that the area was generally characterized by considerable shallow depth to bedrock, high water table, poor soil permeability and land drainage, and high erosion potential.

On this point Mr. O'Grady referred to a map entitled "Composite Limitations" this being a composite of the factors of excessive slopes, poor soil drainage, shallow bedrock, high water table, slope permeability and high erosion potential. The conclusion was that in the A-1 zone the

above conditions were present to a substantial degree, and to a very significant degree within the severe category (T108, 25 to T109, 3). This included the fact that northern Montville is replete or almost totally categorized as having severe limitations for septic effluent disposal (T109, 21-24 to T110, 1-6). O'Grady then stated that all of these factors indicated that low density development was essential for northern Montville (T110, 1-3).

Mr. O'Grady also testified that it was his understanding, based upon the geology of this area, that is precambrian gneiss bedrock, where septic systems and private wells are to be utilized, that a lot size of 3 to 4 acres is recommended because of the limitations on ground water supply and the potential pollution hazards caused by septic tanks. His recommendation for the 3 acre lot size was then given specific expert support by the State Geologist, Joseph Miller, (who testified for the defendant-intervenor) who testified that given the geologic condition of the area, where wells and septics are to be utilized, that he recommends a 3 to 4 acre zoning density. His conclusion was based on his opinion that if houses are not properly spaced out that there is a risk of insufficient ground water supply and the pollution of wells from septic tanks.

In the third area of consideration, that of the absence of water and sewer utilities, Mr. O'Grady indicated that the rezoned area is not served by these utilities, that he did not foresee any extension of water and sewer in the area in the foreseeable future, and that he could not anticipate such an extension because of their remoteness and the high costs of the extension because of the bedrock conditions, and that therefore he had to base his planning judgment on the existing conditions and assume the use of septic and wells (T113, 25 to T114, 17). These facts also led to his recommendation of low density development in northern Montville.

This witness concluded in the final area of remoteness from municipal services, pointing out that northern Montville is not served by good road access and is remote from municipal facilities such as schools and fire stations.

This witness concluded that, notwithstanding the departure from prior zoning practice and taking all the foregoing considerations collectively, he was convinced that the increase in lot size to a 3 acre density to be a reasonable one based upon the combination of factors. He so stated that given the natural limitations of the area, and of the other considerations collectively, that he felt strongly that there must be a low density for this area of the Township and that the Township should continue to grow first in the areas served by the utilities. He also stated, that even if one were to assume the existence of an approved sewer disposal plant, that the problem of water will exist, and that even assuming the existence of both of these utilities that, while his recommendation as to the three acres lot size in particular might change, it is his opinion the need for low density in this area would *not* change (October 16, T178-T179).

When asked to comment on the proposed development of the plaintiffs', this witness indicated that this one particular proposal alone would yield a population increase of 19% of the Township overall and that such an event would cause extreme hardship to the Township.

Additional witnesses for the Township included the Mayor and one of the Township Committeemen, who testified that they had rezoned the area based upon the considerations expressed by Mr. O'Grady, including his recommendation for a three acre lot size.

The trial court, and the reviewing courts, based upon the zoning considerations demonstrated by the Township, sustained the validity of the zoning and such findings are fully supported by the evidence and applicable law.

In its opinion the trial court found as follows, noting first that it had approached the 3 acre lot size with caution, and had considered all available information in arriving at its decision (Opinion, January 9, 1976, T4-5).

1) That the testimony was basically undisputed that the area in question is a steep slope area, with exceptions (January 9, T5, 18-24); that the area was underlain with precambrian gneiss, and that because of the topography the general pattern of drainage was from north to south, from the Lake Valhalla area toward Central & Southerly Montville (January 9, T6, 1-8); that the area in question serves as a drainage basin for the Lake Valhalla area, constituting a headwater (January 9, T6, 9-21); and that the topography is characterized by outcroppings of rock and wetlands (January 9, T6, 22-24), and highly impermeable soil (January 9, T9, 21-24).

The court further concluded that these conditions make development "very, very difficult" (January 9, T9, 24-25).

2) That as far as road accessibility is concerned, the area is not easily accessible (January 9, T7, 1-20), expressly accepting the testimony of the Township planner in this regard (January 9, T17, 1-6).

3) That water is not presently available and is not easily accessible to the 2,400 acre tract, although it could be made accessible to the plaintiffs' tract (January 9, T8, 1-21).

4) That a sewer system is not available and will not be available in the foreseeable future, this conclusion being based in part upon the very slow growth being experienced in the area of the Township (January 9, T8-9).

5) That the natural limitations of the area render the use of septic systems very difficult. The Court ac-

cepted Mayor Eckhardt's testimony on the matter of the problems experienced with package plants and expressed doubt as to the proposal of the plaintiffs' engineer on package plants as a solution.

The Court concluded that, while septic system may not be the best mode, "given a choice between septic system in a low density zoning, based upon what is before me, may be far more reasonable than package sewer plants within the same area" (January 9, T11, 7-11).

6) In an extremely important finding, that any deterrents to development are because of the natural environment, *not* municipal zoning, as discussed in Point II herein.

After making these findings of fact with respect to the Township's actions on selecting a 3-acre density, the court then accepted the testimony of the Township Planning Consultant with respect to the purposes for which this area was increased from a 1-acre to a 3-acre zone (January 9, T17, 3-8). The court further was satisfied with Mr. O'Grady's thorough knowledge of the area (January 9, T16, 13-15), and that his recommendations properly took into account such factors as the impact of the expansion of the water and sewer system that would be required by high density zoning (January 9, T16, 15-25).

The court, taking into account all of the above factors as bearing on the question of reasonableness, then held the 3-acre zoning to be reasonable and appropriate from the proofs both for the 2,400 acres as well as plaintiffs' lands, subject to the cluster provisions being amended as set forth below.

The court stated that it was satisfied the municipality properly took into consideration the natural detriments of the area, and found that no matter how it is zoned "there

are large areas that are not going to be developable because of the steep slopes, because of the wetlands, because of many factors" (January 9, T18, 16-25).

It also found, based upon the proofs, that the amendment was in accordance with a comprehensive plan for the municipality, noting that a great deal of land in southern and central Montville can still be developed; that the municipality is not required to develop everything at one time, this being completely contrary to a comprehensive plan, with the municipality retaining the right to reasonably control its own development (January 9, T17-T18).

The court further found that the municipality had the right to take into consideration the slow growth in the area, and that this was a valid consideration as far as a comprehensive zoning plan is concerned, expansion within southern and central Montville being far more reasonable from both a land use standpoint and from the standpoint of providing services and utilities.

In its findings the trial court made specific reference to the credibility and weight it accorded to plaintiff's experts, expressing dissatisfaction with several of plaintiffs' key witnesses. Plaintiffs' entire case rested upon this testimony, and it is important to bear in mind the proper standards governing expert testimony, its role at the trial, and the standards of appellate review of the trial court's findings in this regard, particularly because the trial judge's determinations were largely based on his evaluation of the witnesses. The universally applied rule is that the credibility of an expert and the weight to be accorded his testimony rests in the domain of the trier of fact.

These included the engineer, Mr. Jeske, of whose testimony the trial judge stated he had a problem of credi-

bility. This also included Mr. Aurnhammer, with whose testimony the judge also expressed an amount of dissatisfaction by reason of the admission by the witness that the proposals he relied upon were just two of an infinite number of modes of subdivision. The same holds true for Mr. Lasser, whose testimony the trial judge found to be weakened in that the facts upon which it was based were those which had in turn been supplied by Mr. Aurnhammer.

The same holds true with the testimony of Mr. Abeles, the trial judge specifically pointing out the inconsistency alluded to in Mr. Abeles' testimony herein, and also the court's conclusion that the witness was not truly familiar with the entire 2,400 acres of the rezoned area, lacking, for example, knowledge as to the location of the nearest fire department and school. Thus the trial court gave little weight to Mr. Abeles' testimony, properly pointing out that such testimony is not binding upon the court, and that it was not satisfied with the foundation upon which the Abeles' opinions were based.

Petitioners also ignore the important feature of the ordinance which provides for clustering. This section was amended so as to meet the objections of the trial court, and was never at any time challenged subsequently by the petitioner herein. This provision permits lot sizes to be reduced to one acre, provided that the plan will not result in greater dwelling unit density than would result from the required lot size.

The court also expressly recognized the validity and purposes of the cluster concept and the need to preserve open space, citing *Chrinko v. So. Brunswick Tp. Planning Board*, 77 N.J. Super. 594, 600-602 (L. Div. 1963). (*N.J. S.A.* 40:55D-2, also expressly sets forth the conservation of open space as a statutory purpose of zoning.)

The basic intent of the new provisions is to achieve greater flexibility and use of the cluster option by taking into account the areas with natural limitations for development and to allow the reservation of such areas for uses which are compatible with those limitations, and which do not require construction. It is the intent of these provisions to meet the objections of the court to the previous conditions of the cluster requiring that the lands dedicated accommodate the public uses and that they be adaptable for the public uses without public expenditures because of topography, drainage or soil conditions, etc.

Petitioners' continued protestations concerning mandatory dedication and taking of lands are clearly fallacious and without merit on the face of the ordinance. Indeed, dedication was completely voluntary under the previous form of the ordinance as it is under the revision.

ARGUMENT

Point I

In instances in which a state tribunal has reasonably concluded that the health, safety or general welfare would be promoted by particular zoning and land use regulations, the United States Supreme Court has consistently upheld same even where such regulations have adversely effected recognized property interests.

It was recognized over 50 years ago by the United States Supreme Court that municipal zoning ordinances are constitutional as a valid exercise of the state's police power when reasonably related to the public health, safety, morals, or general welfare. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

Since the decision in the *Euclid* case, the United States Supreme Court has reviewed only a very small number of zoning cases, normally those arising in the federal courts, and when the Court has acted in this field it has been to reaffirm and expand the principles set forth in that decision. *Berman v. Parker*, 348 U.S. 26 (1954).

This is also evident in several very recent decisions of the Court. In the case of *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), the court expanded the *Euclid* decision:

> "A quiet place where yards are wide, people few and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. This goal is a permissible one within *Berman v. Parker, supra.* The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones for family values, youth values, and the blessings of quiet seclusion and clear air make the area a sanctuary for people."

In that case an ordinance restricting land use to one family dwellings was upheld as meeting constitutional standards and as valid land use legislation.

In *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), the Supreme Court again reaffirmed the principles of these earlier decisions, upholding a town ordinance banning excavations below the water table which effectively precluded the property owner from continuing a sand and gravel excavating business. The Supreme Court found there was no taking because the restrictions served a substantial public purpose, and that merely depriving the most beneficial use is not sufficient to show a taking.

In the very recent case of *Penn Central Transportation Corp., et al., v. City of New York*, 438 U.S. 104 (1978), the Supreme Court upheld New York City's Landmarks Law. Once again, restrictions that were substantially related to the protection of the general welfare were held not to constitute a taking and to be constitutionally valid.

In this case, the Supreme Court took occasion to restate the criteria concerning its view of state zoning decisions.

> ". . . in instances in which a state tribunal reasonably concluded that "the health, safety, morals or general welfare would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land use regulations destroyed or adversely affected recognized property interests. *Nectow v. Cambridge*, 277 U.S. 183 (1928). Zoning laws, of course, are the classic example—*Euclid v. Ambler Realty*, 272 U.S. 365 (1926) (prohibition of industrial use); *Gorieb v. Fox*, 274 U.S. 603, 608 (1927) (requirement that portions of parcels be left unbuilt); *Welsh v. Swasey*, 214 U.S. 91 (1909) (height restric-

> tion), which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property."

In New Jersey, as in other jurisdictions, land use regulation has been expressly encompassed within the state's police power, the New Jersey Constitution having expressly so provided by an amendment in 1927. That amendment also authorized legislative delegation of the power to municipalities. Art. IV, Sec. VI, Para. 2, New Jersey Constitution, 1947. The legislative delegation of the zoning power is now found in the zoning enabling act, *N.J.S.A.* 40:55-30 to 51.

Over the years, the New Jersey Courts have reviewed challenges to zoning regulations under state standards in accordance with the same standards as found in the *Euclid* decision. *Mt. Laurel, supra,* at 174-75.

This particular case is a classic example of the state tribunal having reasonably concluded that the zoning enactment under consideration is valid, following a full challenge at every level of the court system. The record, as discussed herein, amply justified such a conclusion.

In addition to the obvious fact that plaintiffs have had a thorough and exhaustive challenge to the ordinance in accordance with the *Euclid* principles, it is also important to bear in mind that the decision of the state trial court was based in large part upon specific factual findings, including its findings as to the credibility and weight of expert testimony. Such determinations, when supported by adequate evidence and resting largely upon the application of specific facts to the established principles of zoning law, should not be lightly disturbed on appeal under well

recognized appellate standards of both state and federal courts.

It must also be kept in mind that this action was a challenge to a zoning ordinance under the landmark *Mt. Laurel* case, one of the leading exclusionary zoning cases in the nation. In that case, the New Jersey Supreme Court, a court which has held that the requirements of the State constitution may be more demanding than those of the federal constitution, held that every developing municipality in the state has the presumptive obligation affirmatively to plan and provide by its land use regulations for the reasonable opportunity for an appropriate variety and choice of housing, including low and moderate cost housing. The Montville Township zoning ordinance has been challenged against the rigorous requirements of the *Mt. Laurel* case, the New Jersey Supreme Court having found the zoning to be valid by reason of its denial of certification.

In short, plaintiffs' case has been exhaustively tried and been rejected at every level of the New Jersey court system. The United States Supreme Court has refused to review or disturb such judgments. *See Mt. Laurel, supra, appeal dismissed* 423 U.S. 808; *Lionshead Lake, Inc. v. Township of Wayne,* 10 N.J. 165 (1952), *appeal dismissed* 344 U.S. 919, 73 S. Ct. 386, 97 L.Ed. 708 (1953) (approving requirement of minimum floor area for dwellings, the same in all residential districts); *Vickers v. Township Committee of Gloucester Township,* 37 N.J. 232 (1962), *cert. den.* 371 U.S. 233, 83 S. Ct. 326, 9 L.Ed.2d 495 (1963) (sustaining ordinance provisions prohibiting mobile home parks throughout the township).

Here, there can be no question that the record amply justifies the result reached by the New Jersey courts.

Point II

No issues of the taking of property are raised where the record reveals that petitioners failed to demonstrate that the zoning restrictions rendered their lands useless, and in fact conceded that their lands could be developed under the zoning amendment.

The contention that plaintiffs have been deprived of all use of their lands is completely false. In fact, plaintiffs' very own expert real estate witness conceded this point in his testimony.

What was particularly noteworthy of Mr. Lasser's conclusions were his use of the term "limited" and "upper fringe of the market" (October 15, T24, 3-5) when referring to the type of housing permitted by the zoning amendment at issue. This point was also clearly conceded by the witness on cross-examination by the Township:

> "Q. Using your own words, you said that the market you're talking about is the fringe or the upper reaches. My question to you is: Are you saying that or that there is absolutely no market for this type of housing? Which is it?
>
> A. No. My testimony was that there was a market however small, a very minor market, which I estimated to be from one to 15 house per year in Montville over the entire town, and I referred back to experience in the town itself as a basis for that" (October 15, T56, 5-13).

The witness also clearly indicated that (even assuming arguendo that the costs he relied upon were accurate) the market for the $80,000 or more homes (which he claimed would result under the zoning ordinance) was small and

stable and not affected by local and national economic conditions (October 15, T55, 8-23).

The main objection expressed by this witness seemed to relate primarily to the "front end" costs allegedly incurred by the developer under the zoning (October 15, T24, T3-12; T30, 3-10). This of course is nothing more than argument based on a developer's most preferred method to finance his developments and achieve his highest profit expectations, not evidence of confiscation by zoning.

This witness also conceded that at least some of the land could be used which fronted along the existing streets, which again goes to a showing not of confiscation, but of loss of a more profitable use (October 15, T63, 4-25 to T64, 1-4).

A "limited" market does not mean no market, and thus in and of itself the testimony of this witness failed to prove that the plaintiff has been deprived of any reasonable use of his property by this zoning.

This witness also acknowledged that the pace of development of northern Montville has been "extremely slow paced" and that this had nothing to do with the July, 1974 zoning amendment (October 15, T56, 23-25 to T57, 1-25). When asked as to why this slow growth might have occurred, he was of the opinion that the more attractive land and the more developable land was developing first in the Township.

He also testified that such lands might develop first by reason of their being easier lands to develop, and the availability of roads, water and sewer services (October 15, T59, 17-25 to T60, 1-17). This is precisely one of the points that the Township stressed, that development has

in fact and also should as a matter of sound planning take place first in those areas of the Township which have the facilities to support it.

For the petitioners to assert that a taking has occurred, or that the Township has "stopped development" is absurd in view of this testimony from their very own witness.

The trial court made an important finding on this point, which is that any deterrents to development are created because of the natural environment, *not* municipal zoning:

> "This is one of the reasons that I do not accept the arguments by plaintiff's counsel that the development of this area has been inhibited by the zoning therein. I do not think that this is true because I do not feel that the proofs support it. The testimony before me is to the effect that there are, if I recall correctly, 47 homes within this 2400 acre tract of land in northern Montville. This goes back to the early 1950's as far as I can recall. So that if there is any deterrents as far as development is concerned, I do not feel it has been because of municipal zoning. I feel that it has been because of the natural environment, the natural detriments as far as the land itself is concerned (January 9, T9, 7-24)."

In view of the record on this question, petitioners' assertions concerning a taking are completely false. The most that might have been shown is that petitioners might have been deprived of a more profitable use of their lands, a showing which is clearly insufficient. *City of East Lake v. Forest City Enterprises, Inc.*, 428 U.S. 668, 674, Note 8; *Goldblatt v. Town of Hempstead*, 369 U.S. 590.

Point III

Under long-established federal and state standards of judicial review, where, as here, the record demonstrates a reasonable basis for the zoning it must be sustained by the courts.

The proper scope of judicial review is a fundamental point in a consideration of any zoning case. The Supreme Court as well as the New Jersey courts have always recognized that zoning is a municipal legislative function that is beyond intervention by the courts unless clearly arbitrary or unreasonable. *Euclid v. Ambler Realty, supra,* at page 388; *Berman v. Parker, supra,* at 32-33.

The standard of judicial review was well-summarized in a recent New Jersey Supreme Court decision:

> It is fundamental that zoning is a municipal legislative function beyond the purview of interference by the courts unless an ordinance is seen in whole or in application to any particular property to be clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the statute, *N.J.S.A.* 40:55-31, 32. It is commonplace in municipal planning and zoning that there is frequently, and certainly here, a variety of possible zoning plans, districts, boundaries, and use restriction classifications, any of which would represent a defensible exercise of the municipal legislative judgment. It is not the function of the court to rewrite or annul a particular zoning scheme duly adopted by a governing body merely because the court would have done it differently or because the preponderance of the weight of the expert testimony adduced at a trial is at variance with the local legislative judgment. If the latter is at lease debatable it is to be sustained (at 343).

Bow & Arrow Manor v. West Orange, 63 N.J. 335, 343 (1973).

In addition to the foregoing findings of fact and conclusions, much of which were based upon matters involving credibility and weight given to expert testimony and therefore not lightly disturbed upon appeal, the trial court's legal conclusions, as affirmed on appeal, on reasonableness and compliance with a comprehensive plan are fully supported by the record and decisional law.

On the question of the municipality's unquestionable right to control population density by zoning, Montville's efforts to cope with potential crowding, congestion and inability to provide public facilities in this area clearly constitute a sound basis for the rezoning and a reasonable exercise of the zoning power, as the court found. New Jersey Municipal Land Use Law, *N.J.S.A.* 40:55D-2(e); *Euclid v. Ambler Realty, supra; Berman v. Parker, supra; Village of Belle Terre, supra; Mountcrest Est., Inc. v. Rockaway Mayor and Tp. Com.*, 96 N.J. Super. 149, 155 (App. Div. 1967); *Clary v. Borough of Eatontown*, 41 N.J. Super. 47 (App. Div. 1956).

Similarly, the trial court's consideration of the effect of the amendment with reference not simply to petitioners' development proposals, but, as Mr. O'Grady did, with reference to entire area rezoned and the Township as a whole, was completely correct. *Fischer v. Township of Bedminster*, 11 N.J. 194, 206 (1952), *Bow & Arrow Manor v. Town of West Orange, supra.* The failure to do this was a critical defect in plaintiffs' case.

Nor is there any authority in any case cited by petitioners for the proposition that every portion of the municipality is suited and must zone for high density uses. In fact the New Jersey Supreme Court expressly recognized to the contrary at 67 N.J. at 187:

> "This is not to say that land use regulations should not take due account of ecological or environmental factors or problems. Quite the contrary. Their importance, at last being recognized, should always be considered." *So. Burl. Cty. N.A.A.C.P. v. Tp. of Mt. Laurel*, 67 N.J. 151, 187 (S. Ct. 1975).

Clearly this recognition applies not only to environmental considerations, but to such other zoning considerations as availability of sewers, accessibility, services, and all of the various factors which the trial Court recognized in sustaining the three acre zoning.

Thus it is clearly consistent with established zoning law and the principles of a comprehensive plan to have large lot, low density zoning in an area of the municipality where, as here, the facts warrant such zoning, and allowing other density levels and types of housing elsewhere in the municipality where they can be properly accommodated, as the Township did in the enactment of its revised comprehensive zoning ordinance. *Euclid, supra.; Berman, supra; Belle Terre, supra; Mt. Laurel, supra.*

It is also consistent with the New Jersey Municipal Land Use Law, which sets forth the promotion of appropriate population densities as one of the statutory purposes of zoning. *N.J.S.A.* 40:35D-2(e).

Nor can there be the slightest doubt as to the right, and indeed the obligation, of the municipality to take into account the natural limitations of the land in determining proper zoning, again as the trial court found; nor that such considerations in the zoning process do not give rise to any issues of taking because of the substantial public purpose of preventing harm. *Goldblatt v. Town of Hempstead, supra.*

Additionally, the New Jersey Municipal Land Use Law contains a clear legislative directive to consider the natural environment when enacting appropriate zoning. *N.J.S.A.* 40:55D-2; 55D-28(2).

These authorities leave no doubt as to the need to consider the natural environment and also that the landowner has no absolute right to develop his land in a manner for which it is inherently unsuited.

In particular, on the question of zoning to take into account terrain and the likelihood of septic disposal problems, a specific issue here, see *Salamar Builders Corp. v. Tuttle*, 29 N.Y.2d 221, 275 N.E.2d 585, 325 N.Y.S.2d 933 (C. of A. 1971); *Nattin Realty, Inc. v. Ludewig*, 67 Misc. 2d 828, N.Y.S.2d 668 (S. Ct. 1971); *Steel Hill Development, Inc. v. Town of Sanbornton*, 388 F. Supp. 301 (D.C. N.H. 1972); *aff'd* 469 F.2d 956 (1st Cir. 1972).

The need to consider the availability of utilities is also a basic purpose of zoning. *Mountcrest Estates v. Rockaway, supra; Mt. Laurel, supra; N.J.S.A.* 40:55D-28(5)(6). The same holds true for accessibility and traffic *N.J.S.A.* 40:55D-28(5), and community facilities *N.J.S.A.* 40:55D-28(6).

As to the argument that these considerations are properly left to site plan and subdivision review, the Township submits that this is totally contrary to good planning practice. First, based upon the evidence in this case there is no evidence sufficient to overcome the Township's judgment that this area is not sewered and may not be sewered for a long time and will have to develop with septic tanks, and that there is a danger of improper operation and pollution from the plaintiffs' proposed system, which has not even been approved by the State.

Second, even if such an approved facility is to be assumed, then the question still remains as to how the availability of water can be assumed, there being no dispute that the property is not presently served by a water line, which is not contemplated at this time and which may not be built

in the foreseeable future, if ever. The plaintiffs also failed to introduce any proofs as to the sufficiency of the present onsite water supplies to sustain its proposed density, there being no municipal water in the area and no immediate prospect of there being any, and no proofs that plaintiffs could obtain water from the municipality, that even negotiations are pending, or that the municipality has the resources to provide water or that it would be willing to extend the system.

The assumption of water and sewer assumes away the critical issues in the case, and while easily made by the individual owner, they are assumptions in which the Township simply cannot indulge in determining the proper density for 2,400 acres, or some 19% of the land area of the Township of Montville. If, as in fact the evidence has shown, the area does lack the essential facilities of sewer and water and does contain severe natural limitations, including septic disposal and water supply, the Township submits that the time to take these factors into account is now, and not be confronted later with subdivision, site plan and building applications for an area which simply cannot sustain the population sought by plaintiffs on its tract (let alone for the remaining area of the A-1 zone) and could not provide the necessary services which the plaintiffs are so willing to assume away in this case. A policy of permitting high density land use in an area known to be incapable of supporting it is contrary to every concept of proper planning and zoning.

Thirdly, even if the existence of both of these facilities is assumed, there is no evidence sufficient to overcome the Township's judgment that this area must develop on a low density basis given the combination stressed by Mr. O'Grady of its natural limitations, the absence of utilities and remoteness from municipal services.

Sound principles of planning and zoning demand that the Township consider, as it did, the ability of the land to support development and of the impact of development on other areas.

The evidence was clear, and the Township's judgment therefore reasonable, that severe limitations are presented for development: the topography and soil conditions are such as to create the likelihood of drainage and erosion problems, inhibit the installation of municipal water and sewer facilities, and the installation of a properly functioning package plant; that therefore the area would necessarily be limited to the use of wells and septic tanks based upon these conditions; that the geologic nature of the area limits ground water supply and creates the likelihood of pollution of wells from septic systems, with the State Geologist recommending a 3-4 acre lot size; that high density development must be serviced by municipal water and sewer; that the area is remote from municipal utilities and services; that the Township should develop first in those areas served by sewer and water; that the 3-acre lot size with the 1-acre cluster was the most appropriate and reasonable way to achieve the necessary density and at the same time allow for concentration of development in the most developable areas.

In sum, the record clearly reveals that the plaintiffs' property has been zoned as part of a comprehensive plan for the entire Township, intended to accommodate growth in those areas able to support it consistent with the purposes of sound planning. The proofs also reveal that the property in question can be utilized and is not confiscatory. It is not the municipality's obligation to maximize the potential profit to a landowner. It is not enough to demonstrate that property can command greater sales value by permitting increased density, and an owner is not entitled to have his property zoned for its most profitable use. The

petitioners, as all courts below have found, have failed to overcome the presumption of validity of the ordinance, and carry their heavy burden, which is to prove that the municipality's actions are clearly arbitrary, capricious, and unreasonable and bear no substantial relation to the public health safety convenience, and welfare. *Burns v. City of DesPeres,* 534 F.2d 103, *certiorari denied* 429 U.S. 861. Even if a debatable question had been presented, local legislative judgment prevails.

We are dealing with a local legislative determination that the area in which plaintiffs' particular lands are located are not suited for high density development, and that lands elsewhere in the municipality are better suited for such uses. The three acre lot size is hardly unique, and is fully supported by the evidence and by all recent New Jersey Supreme Court pronouncements on the question. *Oakwood at Madison, Inc. v. Township of Madison,* 72 N.J. 481, 505, Note 9.

Such zoning is envisioned by and supported by well-established zoning law, both on the merits of such zoning as well as the proper standards of judicial review and the reluctance to interfere with local legislative judgments where a reasonable basis for the zoning exists, as it did here.

CONCLUSION

Therefore, the Respondent, Township of Montville, respectfully submits that the evidence in the case and the controlling law warrant the opinions and judgments entered by the courts of the State of New Jersey, that same should be affirmed in all respects, and that no grounds for granting the Writ have been demonstrated.

Respectfully submitted,

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